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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 4

PAN AMERICAN AIRWAYS CORPORATION and PAN AMERICAN AIRWAYS, INC.,
Petitioners,

against

W. R. GRACE & CO.,
CIVIL AERONAUTICS BOARD, ET AL.,
Respondents.

No. 5

EASTERN AIR LINES, INC.,
Petitioner,

against

W. R. GRACE & CO.,
CIVIL AERONAUTICS BOARD, ET AL.,
Respondents.

MOTION TO DISMISS WRITS OF CERTIORARI

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Now come Pan American Airways Corporation and Pan American Airways, Inc., petitioners in No. 4 and respondents in No. 5, and W. R. Grace & Co. and Pan American-Grace Airways, Inc., respondents in Nos. 4 and 5, and move that the writs of certiorari granted by this Court on June 10, 1946, be dismissed, and for grounds of such motion set forth as follows:

1. On June 10, 1946, this Court issued writs of certiorari, one on the petition of Pan American Airways Corporation and Pan American Airways, Inc., and the other on the petition of Eastern Air Lines, Inc., to review an

order of the Court of Appeals for the Second Circuit, filed February 25, 1946, in a cause pending in said Circuit Court of Appeals entitled "W. R. Grace & Co., Petitioner, against Civil Aeronautics Board, Pan American Airways Corporation, Pan American Airways, Inc., et al, Respondents." The cause so pending in the said Court of Appeals was initiated by a petition filed by W. R. Grace & Co. to review an order of the Civil Aeronautics Board dated May 24, 1944, (R. pages 4-5) and certain related orders of the Civil Aeronautics Board.

2. The said order of the Civil Aeronautics Board dated May 24, 1944, had dismissed for want of jurisdiction on the part of the Board a certain proceeding pending before the Board bearing the Board's Docket No. 779 entitled "In the Matter of the Panagra Terminal Investigation".

3. The nature of the said proceeding Docket No. 779 before the Civil Aeronautics Board was as follows:

Pan American-Grace Airways, Inc. (hereinafter called "Panagra") is a Delaware corporation. Half of the capital stock of Panagra has at all times been owned by Pan American Airways Corporation and half by W. R. Grace & Co. Pan American Airways Corporation and W. R. Grace & Co. has each had at all times equal representation upon Panagra's Board of Directors. Panagra is an air carrier as defined in the Civil Aeronautics Act of 1938 and holds a certificate of public convenience and necessity authorizing operations between the Canal Zone and Buenos Aires, Argentina via the west coast of South America (R., p. 6). Pan American Airways Corporation owns all of the stock of Pan American Airways, Inc., an air carrier holding a

certificate of public convenience and necessity for operations between various points in the continental United States and the Canal Zone, as well as between points in the continental United States and other points in Latin America and elsewhere.

For some time prior to the initiation of Docket 779 W. R. Grace & Co. had advocated, and Pan American Airways Corporation had opposed, the filing by Panagra of an application for a northward extension of Panagra's certificate from the Canal Zone to a point or points in the continental United States. Because of the equal division in Panagra's Board of Directors, no such application was filed. On December 16, 1941, W. R. Grace & Co. filed a petition and complaint, Docket No. 707, with the Civil Aeronautics Board, requesting the Board to institute a proceeding pursuant to Section 401(h) of the Civil Aeronautics Act to alter, amend and modify Panagra's certificate of public convenience and necessity so as to make the northern terminal of Panagra's route a point in the continental United States (R., p. 8).

By order dated September 10, 1942, as amended by subsequent order dated October 22, 1942, the Board, of its own motion, instituted a proceeding, Docket No. 779, to determine whether the public convenience and necessity required that Panagra's certificate be altered, amended and modified to authorize and require that Panagra's route terminate at one or more designated points in the continental United States (R., pp. 9-10). Pan American Airways Corporation moved to dismiss said proceeding on the ground that Section 401(h) of the Civil Aeronautics Act did not authorize the Board to extend the route of an air carrier in the absence of application for such an extension by the

carrier and, in the alternative, that, even though such power might exist in certain cases, the Board could not compel the carrier to extend its lines into a territory wholly different from that previously served (R., p. 10). After hearings had been held, the Board granted this motion and dismissed the proceeding on the ground that, although Section 401(h) of the Act gave the Board certain powers to require extensions by air carriers, this did not include an extension, such as that believed to be involved in the pending case, which "would constitute a basic transformation of the character of the carrier" (R., p. 17).

4. The Court of Appeals for the Second Circuit, on petition for review filed by W. R. Grace & Co., directed that the proceeding be remanded to the Civil Aeronautics Board for further proceedings in conformity with the Court's opinion dated January 28, 1946 (R., p. 433). The Court stated that it would "assume for argument that the Board was right in its holdings, if Panagra was to be regarded as an unwilling carrier, and if therefore the only issue was whether the proposed extension could be forced upon it" (R., p. 369). However, the Court held, on the analogy of a stockholder's suit, that it was within the power of the Board to inquire whether the conduct of Pan American, in opposing the extension, was characterized by "fraud" or "illegality" as against W. R. Grace & Co., its fellow stockholder, and that, if the Board found either of these issues against Pan American, it might then hold that W. R. Grace & Co. had the right "to speak for Panagra, and by doing so to make the application a voluntary one" (R., p. 370).

5. Petitions for certiorari to review said decision by the Circuit Court of Appeals were filed by Pan American

Airways Corporation and Pan American Airways, Inc., and also by Eastern Air Lines, Inc., all of which had been parties to the proceedings before the Board and before the Circuit Court of Appeals. Such petitions were granted by this Court on June 10, 1946. No further proceedings in Docket No. 799 have been taken by the Civil Aeronautics Board.

6. Under date of July 30, 1946, two agreements were made, one between Pan American Airways, Inc. and Panagra, and the other between Pan American Airways Corporation and W. R. Grace & Co. The agreement between Pan American Airways, Inc. and Panagra (hereinafter called the "Through Flight Agreement") provided that Pan American Airways, Inc. would, at Panagra's request, charter any aircraft operated by Panagra into the Canal Zone from Lima, Peru or any point south thereof "for through operation from the Canal Zone over one of PAA's routes to the continental United States and for return operation to the Canal Zone over the same route" and for other cooperative arrangements between the parties. The Through Flight Agreement was specifically subject to the approval of the Civil Aeronautics Board under the applicable provisions of the Civil Aeronautics Act and was to become effective only upon an order of the Board approving the agreement becoming final. The agreement between Pan American Airways Corporation and W. R. Grace & Co. ratified the Through Flight Agreement and provided in paragraph 6 as follows:

> "6. *Pending Litigations.* The parties will forthwith make suitable application to the Supreme Court of the United States and to the Civil Aeronautics Board requesting that the proceedings now pending in the said court and before the said Board relating

to the controversies between them shall be kept *in statu quo* until the Civil Aeronautics Board shall have made a final order in the proceeding relating to the Panagra-PAA contract contemplated by paragraph 20 thereof and, if a timely proceeding to review any such order shall be instituted, until such proceeding for review shall have been finally determined. Upon an order of the Civil Aeronautics Board approving said contract having been made and become final, the parties will make appropriate applications for the dismissal of all such proceedings."

7. By order Serial No. E-570, dated May 5, 1947, the Civil Aeronautics Board approved "the through flight agreement between Pan American Airways, Inc. and Pan American-Grace Airways, Inc. dated July 30, 1946, and the companion agreement between Pan American Airways Corporation and W. R. Grace and Co., dated July 30, 1946" subject to the condition that such approval should be for a term of three years from the date of the Board's order, at which time the Board, without further hearing, if deemed appropriate, might extend the approval for such period as might be desirable at that time, and to certain other minor conditions and modifications. By agreement dated May 28, 1947, Pan American Airways, Inc. and Panagra accepted the conditions and modifications prescribed by the Civil Aeronautics Board and further provided that the Through Flight Agreement should become effective immediately. On the same date an agreement was made between Pan American Airways Corporation and W. R. Grace & Co. ratifying this action and further providing that the agreement between them dated July 30, 1946, should become effective immediately except as to paragraph 6, which should become effective only upon the order of the Board dated May 5,

1947 becoming final, or such earlier date as might be agreed upon. Services under the Through Flight Agreement were instituted on May 31, 1947, and have been regularly conducted since that date.

8. By order Serial No. E-728, dated July 31, 1947, the Civil Aeronautics Board overruled exceptions and denied petitions for reconsideration of the Board's order Serial No. E-570 approving the agreements of July 30, 1946. The sixty-day period provided by Section 1006 of the Civil Aeronautics Act for petitioning for review of the Board's said order No. E-570 has now expired without any petition for review having been filed. The Board's said order has thereby become final within the meaning of the agreement between Pan American Airways Corporation and W. R. Grace & Co.

9. The Through Flight Agreement and the companion agreement of July 30, 1946, between Pan American Airways Corporation and W. R. Grace & Co. effectively dispose of the controversy which formed the subject matter of the writs of certiorari issued by this Court. These agreements were intended as a settlement of the difficulties which had given rise to this litigation and were approved by the Civil Aeronautics Board on that basis.

WHEREFORE, Pan American Airways Corporation, Pan American Airways, Inc., W. R. Grace & Co. and Pan American-Grace Airways, Inc. move this Court that the writs of certiorari granted on June 10, 1946 in the above-entitled proceedings be dismissed, without costs to any of the parties as against the others, on the ground that no con-

troversy between the parties now exists and that these causes have become moot.

Respectfully submitted,

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and
PAN AMERICAN AIRWAYS, INC.

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